RECORD
AND
BRIEFS

NO. 16-6855

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IN THE SUPREME COURT OF THE UNITED STATES

MARION WILSON,

PETITIONER

v.

ERIC SELLERS, WARDEN

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF FOR THE RESPONDENT

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## CAPITAL CASE

## QUESTION PRESENTED

Under 28 U.S.C. § 2254(d) of the Antiterrorism and Death Penalty Act (AEDPA), the final adjudication of a claim by a state court is given deference and may not be overturned unless it is based upon an unreasonable determination of the facts or is contrary to, or an unreasonable application of, this Court's clearly established precedent. Pre-AEDPA, this Court held in *Ylst v. Nunnemaker*, 501 U.S. 797, 803-804 (1991), that when a state court issues a summary denial the federal courts will presume the "silent" decision rests on the same procedural grounds as the last reasoned state court opinion, thereby creating the "look through" principle. Post-AEDPA, this Court held in *Harrington v. Richter*, 562 U.S. 86, 99 (2011), that the federal courts will presume a state court's summary denial is an adjudication on the merits absent evidence to the contrary and give the decision § 2254(d) deference. The Eleventh Circuit has interpreted this precedent and § 2254 (d) to mean a final state court summary adjudication on the merits will no longer be "look[ed] through" in order to give § 2254(d) deference to the last reasoned decision of a state court. By contrast, the Fourth and the Ninth Circuits have determined that federal courts should "look through" a summary merits adjudication and give § 2254(d) deference to the last reasoned decision of a state court.

The question presented is whether this Court's precedent and the AEDPA dictate that federal courts not "look through" and give deference to the last reasoned state court opinion—as the Eleventh Circuit has held—but instead afford § 2254(d) deference solely to the final state court summary adjudication on the merits.

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BRIEF FOR THE RESPONDENT

## OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. A), sitting *en banc*, is reported at 834 F.3d 1227. The panel decision (Pet. App. B) that was vacated by the *en banc* court's grant of rehearing is reported at 774 F.3d 671. The decision of the federal habeas district court (Pet. App. C) is unreported. The summary denial of Wilson's application for certificate of probable cause to appeal (CPC) by the Georgia Supreme Court (Pet. App. E) is unreported. The state habeas trial court's order denying relief (Pet. App. D) is unreported.

## JURISDICTION

The Eleventh Circuit Court of Appeals' *en banc* decision was entered on August 23, 2016. The jurisdiction of this Court is invoked under §§ 28 U.S.C. 1254(1), 2101(e). Additionally, jurisdiction is invoked under Supreme Court Rule 11, allowing a petition for certiorari review prior to a United States court of appeals entering judgment.

## STATUTE INVOLVED

28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT

In November of 1997, Wilson was convicted of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. *Wilson v. State*, 271 Ga. 811 (1999). Wilson was sentenced to death for his crime of malice murder on November 7, 1997. *Id.* at 812, fn. 1. "[T]he trial court imposed consecutive sentences of life imprisonment for armed robbery, twenty years in prison for

hijacking a motor vehicle, five years in prison for possession of a firearm during the commission of a crime, and five years in prison for possession of a sawed-off shotgun." *Id.* The Georgia Supreme Court affirmed Wilson's convictions and sentences on November 1, 1999. *Id.* This Court denied certiorari review on October 2, 2000. *Wilson v. Georgia*, 531 U.S. 838 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

Wilson filed a collateral attack on his sentence in the state habeas court. In a lengthy reasoned opinion, the state habeas court denied Wilson relief on December 1, 2008. (Pet. App. D). The Georgia Supreme Court, on May 3, 2010, summarily denied Wilson's CPC application. (Pet. App. E). On December 6, 2010, this Court denied certiorari review. *Wilson v. Terry*, 562 U.S. 1093 (2010).

Wilson filed his federal habeas petition on December 17, 2010. (Doc. 1). The district court denied federal habeas relief on December 19, 2013 (Pet. App. C), and granted Wilson a certificate of appealability on his claim that trial counsel were ineffective during the sentencing phase. (Doc. 51 at 108-109).

While Wilson's case was pending, the Eleventh Circuit, in *Jones v. Ga. Diagnostic & Classification Prison Warden*, parted with long-standing practice and held that the Georgia Supreme Court's summary denial of a petitioner's CPC application was the final state court merits decision for purposes of § 2254 review. 753 F.3d 1171, 1182 (11th Cir. 2014). The court applied this new precedent in

*Hittson v. GDCP Warden*, 759 F.3d 1210, 1233 (11th Cir. 2014), and held it would no longer "look through" a summary denial of a CPC application to the last reasoned opinion of the state habeas trial court. Thereafter, this precedent was applied in *Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785 (11th Cir. 2014). On December 15, 2014, in Wilson's case, a panel of the Eleventh Circuit affirmed the denial of habeas relief after giving § 2254(d) deference solely to the Georgia Supreme Court's summary denial of Wilson's CPC application. (Pet. App. B).

Wilson requested rehearing *en banc*. On July 30, 2015, the court vacated the panel opinion and granted Wilson's request for rehearing *en banc*. The court ordered the parties to "focus" on the following:

> Is a federal habeas court required to look through a state appellate court's summary decision that is an adjudication on the merits to the reasoning in a lower court decision when deciding whether the state appellate court's decision is titled to deference under 28 U.S.C. § 2254(d)?

The parties agreed that the answer to this question was that the federal courts should "look through," which prompted the court to appoint counsel as amicus curiae to argue the opposing view.

Following oral argument, the court requested, and the parties submitted, briefs on "whether the denial of an application for a certificate of probable cause

by the Georgia Supreme Court is an adjudication on the merits for purposes of section § 2254(d)."

Subsequently, in a 6-5 split, the court first held the Georgia Supreme Court's summary denial of a CPC application was a merits adjudication. (Pet. App. A at 1232-35). Then the court determined that federal courts should not "look through" a summary merits adjudication and give § 2254(d) deference to the last reasoned state court decision. *Id.* at 1235-42. Two lengthy dissents were issued by the court explaining that the answer to the question should have been "look through," regardless of the whether the final summary decision was an adjudication on the merits or was a discretionary denial. *Id.* at 1242-69. The majority and the dissents each acknowledged the circuit split created by the majority opinion. *Id.* at 1241-42, 1245, 1260. The court remanded the appeal to the panel "for consideration of the remaining issues," which consisted of Wilson's underlying federal habeas claims. *Id.* at 1242.

On November 10, 2016, Wilson filed his petition for writ of certiorari with this Court challenging only the decision of the *en banc* court regarding the method of federal habeas review—in other words, whether federal courts should "look through" a final summary adjudication and instead give § 2254(d) deference to the last reasoned state court decision.

## DISCUSSION

### I. RESPONDENT DOES NOT OPPOSE CERTIORARI REVIEW

The question before this Court concerns whether the Eleventh Circuit has properly interpreted § 2254(d), *Ylst*, and *Richter* in deciding whether to give AEDPA deference to the last reasoned state court opinion where a later summary denial on the merits is issued. Wilson argues the court wrongly interpreted this body of law in determining that federal courts should not "look through" a final summary adjudication on the merits to give § 2254(d) deference to the last reasoned state court opinion.[1] As pointed out by Wilson and acknowledged by the Eleventh Circuit, there is a split amongst the circuits regarding whether the federal courts should "look through" a final summary adjudication on the merits to the last reasoned opinion of a state court. (Pet. App. A at 1241). Given the clear split and the importance of this issue, Respondent does not oppose certiorari review by this Court.

Specifically, the Fourth and the Ninth Circuit have answered this question and found the federal courts should "look through" a summary merits adjudication. (Pet. App. A at 1241). Other circuits do practice the "look through"

[1] Respondent argued in the Eleventh Circuit that both positions were supported by caselaw and statute but based upon precedent and practice the better answer was to "look through" a summary denial regardless of whether it was discretionary or an adjudication on the merits.

principle from *Ylst*, but none have specifically answered this question currently posited to the Court.[2] *See id.* at 1241, 1260.

As part of its examination of which state court opinion should receive § 2254(d) deference, the Eleventh Circuit first decided that the Georgia Supreme Court's summary denial of a CPC application was a decision on the merits. (Pet. App. A at 1232-35). Both Wilson and Respondent argued below that this was the incorrect legal answer and Respondent does not repudiate his position here. *Id.* Although Wilson makes several points in his brief in contention with the court's finding on this issue, it is not part of the question presented on which he is seeking certiorari review.

A. The Eleventh Circuit's opinion creates a clear split in the circuits and contains findings not fully in accord with this Court's precedent.

The Eleventh Circuit acknowledged that summary denials which are merits adjudications may be "look[ed] through" to determine whether a claim was decided on the merits or was dismissed due to a procedural bar. (Pet. App. A at 1235). But the court reasoned that the *Ylst* "look through" principle did not extend to giving § 2254(d) deference to the last reasoned opinion where there is a later summary denial on the merits. This decision creates an admitted split amongst the

[2] The Eleventh Circuit majority opinion states that "other circuits" which have "look[ed] through" without answering the question before this Court, have only done so with discretionary denials. *Id.* at 1241.

circuits.[3] (Pet. App. A at 1241 (the Eleventh Circuit acknowledges its decision is contrary to that of the Fourth and Ninth Circuits)). Additionally, there is precedent from this Court strongly indicating this Court has "look[ed] through" a summary merits adjudication and given § 2254(d) deference to the last reasoned opinion. *See Premo v. Moore*, 562 U.S. 115, 123 (2011). In sum, the question presented and decided by the Eleventh Circuit is based upon precedent that could be understood as conflicting and requires clarification by this Court.

1. The holdings of *Ylst* and *Richter*

The Eleventh Circuit's decision is informed by the interplay of *Ylst* and *Richter*. Although there are similarities in the core holdings of each case, language from each creates a dichotomy that has seemingly fueled the confusion of the issue presented to this Court. Respondent is not suggesting *Richter* was decided to be at odds with *Ylst*. After all, *Ylst* was cited approvingly by *Richter*. *See Richter*, 562 U.S. at 99-100. Instead the dichotomy is borne from the language in each opinion describing how to treat "silent" state court decisions under federal habeas review.

Decided prior to the AEDPA, *Ylst* concerned a federal court's determination of whether a *Miranda* claim had been decided on the merits or had instead been found procedurally barred by the state courts. *Ylst v. Nunnemaker*, 501 U.S. at 799.

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[3] Notably, in a 2015 concurrence from the denial of certiorari review, Justice Ginsburg—joined by Justice Kagan—expressed her disagreement with the Eleventh Circuit's decision not to give § 2254(d) deference to the last reasoned state court opinion in *Hittson v. Chatman*, 132 S. Ct. 2126, 21-25-126 (2015).

Nunnemaker had presented his claim in superior court, the California Court of Appeal, and ended with his final state habeas petition filed in the California Supreme Court, under the original jurisdiction of the court. *Id.* at 800. The California Supreme Court summarily denied his petition, which was considered a merits adjudication. *Id.* In determining whether the state courts had decided the claim on the merits or had instead found it procedurally barred, this Court held that where "an earlier opinion 'fairly appear[s] to rest primarily upon federal law,' we will presume that no procedural bar has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place." *Id.* at 803.

This Court then explained that,

> The maxim is that silence implies consent, not the opposite -- and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. The essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect -- which simply "looks through" them to the last reasoned decision -- most nearly reflects the role they are ordinarily intended to play.

*Id.* at 804. This has come to be known as the "look through" principle and has been used to not only determine whether the last reasoned opinion rested on a procedural bar but also to give § 2254(d) deference to the reasons of the previous court's opinion. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015); *Johnson v. Williams*, 133 S. Ct. 1088, 1094, n.1 (2013).

Twenty years later, this Court decided *Richter*. The opinion under federal review in *Richter* was a final merits summary denial by the California Supreme Court, the same type of opinion as in *Ylst*. Unlike in *Ylst*, however, there was no reasoned opinion from any state court. Based on *Richter's* state procedural posture, this Court determined that "§ 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Richter*, 562 U.S. at 98, 100. This Court explained that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99. Then, citing to *Ylst*, this Court held this presumption could be overcome "when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 99-100.

As there were no stated reasons by a state court to examine in *Richter*, this Court held, "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 98. This holding has created two opposing points of law. Whereas Ylst states "silent" orders say "nothing" and should be "look[ed] through," *Richter* holds a "silent" order is a merits determination to be afforded § 2254(d) deference if there is any "reasonable

basis" to support the summary denial. And contributing to the tension between these two decisions, is the plain language of § 2254(d) which specifies deference for *only* the final "adjudication."

2. The Eleventh Circuit's interpretation of *Ylst* and *Richter*

Turning to the Eleventh Circuit's *en banc* majority opinion, the court first reiterated this Court's holdings in *Richter* (Pet. App. A at 1235), as enunciated above. The court then examined whether *Richter* allowed a federal court to "look through" a final merits summary adjudication and give deference to the reasons of the previous state court decision. *Id.* Answering this question in the negative, the court reasoned that the holding in *Richter* and the plain language of § 2254(d)—which gives deference only to the last adjudication on the merits—do not provide support "for two divergent analytical modes—one when there is no previous reasoned decision below and another for when there is." *Id.*

Next the court examined *Ylst*. The court correctly stated that "*Ylst* creates a rebuttable presumption that state procedural default rulings are not undone by unexplained orders." (Pet. App. A at 1237). However, the court states in the next sentence, "It does not direct a federal court to treat the reasoning of a decision on the merits by a lower court as the reasoning adopted by a later summary decision that affirms on appeal, especially since neither the Supreme Court nor any federal circuit court operates that way." *Id.* In support of this statement, the court

explains, citing to various non-habeas precedent, why summary denials on the merits do not silently adopt the reasons of the lower court.

While technically true that *Ylst* does not "direct" such action, this Court and other circuits, including the Eleventh Circuit, have used *Ylst* to "look through" to the last reasoned opinion and give those findings § 2254(d) deference. *See* Pet. App. A at 1245 (Jordan, J., dissenting (citing to cases in which the Eleventh Circuit has given § 2254(d) deference to state habeas decisions in Georgia, thereby, "look[ing] through" the summary denial by the Georgia Supreme Court of a CPC application). This type of "look through" principle arose from language in *Ylst* that "silence implies consent, not the opposite – and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Ylst*, 501 U.S. at 804. Although this language is in relation to whether or not a procedural bar or merits finding was determined in the reasoned opinion, it has been used for the broader purpose to "look through" summary merits adjudications and give § 2254(d) deference to the last reasoned state court opinion.

The Eleventh Circuit disagreed with this broader interpretation of *Ylst*. Instead, it found, "The phrase 'look through' from *Ylst* has come to stand for the routine practice of 'looking through' denials of appellate review that are not on the merits to locate the proper state court adjudication on the merits for purposes of

section 2254(d)." (Pet. App. at 1240). However, the court acknowledged that there was a split in the circuits on this issue finding "the Fourth and Ninth Circuits have expressly applied this rule to 'look through' an on-the-merits adjudication of a higher state court and then grant habeas relief, *see Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525-27 (4th Cir. 2016); *Cannedy v. Adams*, 706 F.3d 1148, 1158, 1166 (9th Cir. 2013)." *Id.* at 1241. As stated above, no other circuit than the Fourth, Ninth and Eleventh have specifically answered this question. *Id.* at 1241, 1260.

In addition to the circuit split, at least one case from this Court suggests this Court has "look[ed] through" a summary merits adjudication and given § 2254(d) deference to the last reasoned state court opinion. *Premo v. Moore* could be reasonably interpreted as this Court looking through a summary merits adjudication and giving § 2254(d) deference to the last reasoned opinion.

In *Moore*, this Court examined whether an ineffective assistance of counsel claim was unreasonable under § 2254(d). The state trial court, making specific findings, denied Moore's ineffectiveness claim. *Moore*, 562 U.S. at 123. As correctly found by the Eleventh Circuit, "the Oregon Court of Appeals affirmed without opinion." (Pet. App. A at 1241 (citing *Moore v. Palmateer*, 174 Ore. App. 321 (Or. Ct. App. 2001) (table)). The Eleventh Circuit *en banc* majority did not dispute this summary affirmance was a decision on the merits. *See* Pet. App. A at

1257-58 (Pryor, Jill, J., dissenting (finding the Oregon Court of Appeals summary denial was a decision on the merits)).

Moore specifically claimed trial counsel were ineffective for failing to seek to suppress his confession to law enforcement. *Moore*, 562 U.S. at 123. This Court looked to[4] the state trial court's finding that the "'motion to suppress would have been fruitless'" which resulted in the denial of Moore's ineffectiveness claim. *Id.* (quoting App. 140). This Court then noted that the trial court had not "specif[ied]" whether its decision was based upon the deficiency or prejudice prong of *Strickland*. *Id.* Consequently, this Court stated in deciding Moore's claim: "To overcome the limitation imposed by § 2254(d), the Court of Appeals had to conclude that both findings would have involved an unreasonable application of clearly established federal law." *Id.* This Court determined that the court of appeals had "erred, for the state-court decision was not an unreasonable application of either part of the *Strickland* rule." *Id.* In support of this conclusion, this Court provides additional reasons in support of the state trial court's decision, but the Court never explicitly or implicitly states the trial court's decision is not being given § 2254(d) deference.

[4] Although this Court does not mention *Ylst* or whether it was "looking through" to the last reasoned opinion, a plain reading of this portion of the Court's opinion strongly suggests it was giving § 2254(d) deference to the trial court's opinion.

The Eleventh Circuit disagreed with this reading of *Moore* and determined this Court did not "look through" but "instead appears to have applied *Richter* despite the trial court offering a reasoned opinion." (Pet. App. A at 1241). This finding is premised upon the additional reasons given by this Court in support of the state trial court's decision. But the fact that this Court gave additional reasons in support of the state court's decision, does not mean it did not "look through" and give § 2254(d) deference to that same decision. Neither *Ylst* nor *Richter* nor the AEDPA limits the reasons in support of the state court's judgment to only those announced by the state court.[5] To put it another way, if evidence or law not relied upon by a court may be used to prove unreasonableness under § 2254(d), then evidence or law not specifically relied upon by the state court should also be available to support the reasonableness of the state court's opinion.

The two cases in which this Court clearly "look[ed] through" a summary denial and gave 2254(d) deference to the last reasoned state court opinion, *Brumfield* and *Johnson*, are distinguished by the Eleventh Circuit based upon the discretionary status of the summary denial. While Respondent is not disputing the

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[5] As correctly pointed out by the Eleventh Circuit, reading *Ylst* or *Richter* in a manner that implies the federal courts are supposed to "grad[e]" a state court opinion is not in line with the purpose of the AEDPA. (Pet. App. A at 1239). A prudent statement as the AEDPA is concerned with the overall reasonableness of the federal law and factual determinations of a state court, not whether every single finding is correct beyond any doubt.

discretionary status[6] of those denials, neither *Brumfield* nor *Johnson* explicitly states or even implies that the "look through" principle is only being used because the summary denials were discretionary. *See Brumfield*, 135 S. Ct. at 2276; *Johnson*, 133 S. Ct. at 1094, n. 1. *But see Rapelje v. McClellan*, 134 S. Ct. 399, 399-402 (2013) (Alito, J., dissenting from denial of the petition for writ of certiorari). And, as stated *supra*, the decision "look[ed] through" in *Ylst* was a summary denial on the merits. Nothing in the AEDPA suggests a final *merits* summary adjudication should be "look[ed] through." Thus, in addition to a split amongst the circuits, there appears to be reasonable conflicting interpretations of this Court's precedent.

While there is support for the Eleventh Circuit's decision, this Court's precedent does not clearly answer the question before the Court. Respondent does not disagree with the Eleventh Circuit's finding that this Court has only *clearly* applied the *Ylst* "look through" principle to examine the reasons of a previous state court opinion to cases where the last state court opinion was discretionary. *See Brumfield*, 135 S. Ct. at 2276; *Johnson v. Williams*, 133 S. Ct. at 1094. Yet *Moore* undermines this finding and this Court has never explicitly stated this was the only manner in which the "look through" principle could be utilized. Indeed, as stated above, in *Ylst* this Court "looked through" an adjudication on the merits. However,

[6] Wilson does dispute whether the summary denial in *Brumfield* was discretionary. *See* Pet. Brief, p. 20.

as also correctly pointed out by the Eleventh Circuit, that was to determine whether there had been a decision on the merits or a procedural bar finding, not to look at the specific reasoning of a merits adjudication. *See, e.g.*, *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1605-606 (2016). But this Court has not explicitly held this was improper under § 2254(d).

Then there is the obvious tension between *Ylst* and *Richter*. Where *Ylst* holds an unexplained decision means "nothing" and should be "look[ed] through" to the last reasoned decision, *Richter* holds an unexplained decision is an adjudication on the merits and should be given § 2254 (d) deference. Notably, there was no reasoned opinion to "look through" to in *Richter* and the silent summary denial could not be interpreted to mean "nothing" under the AEDPA. Whether *Richter* should be interpreted as overruling the "look through" principle from *Ylst*, is clearly and issue for this Court to decide. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (overturning a state court decision improperly interpreting the Court's precedent as the Court's "'decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.'" (quoting *Hohn v. United* States, 524 U. S. 236, 252-253 (1998))).

Given the inconclusive nature of the applicable law and the split amongst the circuits, this Court's review of the issue is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## COMPLIANCE WITH PAGE LIMITATIONS

This brief complies with Rule 33.2 of this Court.

**CERTIFICATE OF SERVICE**

I, Sabrina Graham, a member of the Bar of this Court, do hereby certify that I have this day served a copy of RESPONDENT'S BRIEF by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed, upon:

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